

ORIGINAL

FILED

July 22 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-10-0161

BNSF RAILWAY COMPANY,
Appellant/Petitioner

v.

CHAD CRINGLE and MONTANA DEPARTMENT OF LABOR, HUMAN
RIGHTS COMMISSION
Appellee/Respondents

Re: District Court Case No.: BDV-2009-1016

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APPELLEE'S RESPONSE TO DISTRICT COURT FINDINGS

Terry N. Trieweler
TRIEWELER LAW FIRM
309 Wisconsin Avenue
P.O. Box 5509
Whitefish, MT 59937
(406) 862-4597
(406) 862-4685 fax

*Attorney for Appellee/Respondent,
Chad Cringle*

Marieke Beck
Dept. of Labor & Industry
PO Box 1728
Helena, MT 59624-1728
(406) 444-2917
(406) 444-1394 fax

*Attorneys for Appellee/Respondent,
Dept. of Labor & Industry, Human
Rights Division*

Jeff Hedger
Benjamin O. Rechtfertig
HEDGER FRIEND, P.L.L.C.
2800 Central Avenue, Suite C
Billings, MT 59102
(406) 896-4100
(406) 496-4119 fax

*Attorneys for Appellant/Petitioner,
BNSF Railway Company*

ARGUMENT

On March 29, 2010, the District Court entered its Order denying BNSF Railway Company's petition for review of an agency decision because it was untimely and non-appealable pursuant to §49-2-503(3)(c), MCA. In the same Order, it enforced the agency's decision and awarded attorney fees as it was statutorily required to do.

Thereafter, BNSF filed a motion to stay execution of the judgment and requested approval of an inadequate supersedeas bond. On May 21, 2010, the District Court denied BNSF's Motion to Stay and refused to accept BNSF's insufficient bond.

BNSF filed its notice of appeal on March 29, 2010, and on May 28, 2010, asked this court for relief from the District Court's order denying the stay and approval of its proposed bond pursuant to M.R.App.P. 22(2).

Rule 22(2)(a)(i) provides that a district court's denial of a stay or disapproval of bond can only be reversed by this court for "good cause". Good cause is not further defined by the rule nor this court's decisions.

On June 22, 2010, the Court remanded this matter to the District Court for further findings regarding its reasons for denying the relief sought by BNSF. Those findings have now been made and were filed on July 12, 2010.

The District Court's findings are consistent with those arguments made by

the Appellee, Chad Cringle, in opposition to BNSF's motion for relief from the District Court's Order denying its Motion for Stay of Execution of Judgment and Request for Approval of Supersedeas Bond. Therefore, those arguments are incorporated by reference and will not be repeated here.

However, keeping in mind that the only standard of review suggested by either party is that which is referred to on p. 3 of Appellee's previous brief and includes: 1) whether the stay applicant has made a strong showing the he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and, 4) where the public interest lies, the following District Court findings are noted.

In finding No. 2, the District Court found that,

"Like this Court, the Montana Supreme Court has twice affirmed the Department's rulings against BNSF in cases with the same fact pattern as this case. See Mont. Dep't of Labor v. BNSF Ry. Co., 2009 MT 262N, 2009 Mont. LEXIS 394 (Consolidated Cause Nos. DA-08-0517, DA-08-0558, DA-08-0559); *Bilbruck v. Burlington N. & Sante Fe Ry. Co.*, 2009 MT 216N, 2009 Mont. LEXIS 256 (Cause No. DA-08-0424). In both of those cases timely appeals were filed with the Human Rights Commission (HRC); both were appealed to this Court; and then affirmed by the Montana Supreme Court. The only distinguishing fact is that in this case, BNSF's appeal of the hearing examiner's decision to the HRC was untimely."

In Finding of Fact 15, the District Court found that,

"As a result of BNSF's unlawful discrimination, Cringle remains unemployed and, at the time of BNSF's application for a stay and

supersedeas bond, he was having difficulty making house payments, his vehicle had been repossessed, he had sold personal possessions and pawned tools of his trade to support himself, and was, in general, depending on friends and family for financial assistance. He is in danger of losing his home soon if he does not find money with which to pay his taxes.

In Finding of Fact 16, the Court found that,

“Because this Court presided over the two previous appeals, it is familiar with the factual background, the legal issues, the likelihood of success on appeal, BNSF’s previous failure to raise any substantive issues on appeal, and the unreasonable delay that was caused by BNSF’s appeals in the previous two cases.”

In Conclusion of Law No. 5, the District Court held that,

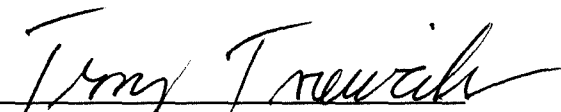
“Whether the fourteen-day period is considered “jurisdictional” and therefore binding or “categorical,” the HRC cannot be compelled by this Court to expand the fourteen-day period set forth in the statute. The legislature has limited this Court’s jurisdiction of DOLI decisions by requiring that they be appealed to the HRC within fourteen days. Section 49-2-503(3)(c), MCA. This Court does not have jurisdiction, and Spear’s decision is final.”

By making these findings, which are undisputed, and its conclusion, the District Court has shown that BNSF cannot meet any of the four criteria for a stay on appeal. It cannot show that it is likely to prevail on the merits of its appeal from the District Court’s decision. More importantly, it cannot show that if it had an opportunity to appeal to the HRC, then to the District Court, and ultimately to this Court, the result would be any different than it was in the previous two cases appealed to this Court. Nor can it show how it would be irreparably injured by compliance with the Department of Labor’s order which is identical to relief

provided in two previous cases. However, it has been shown that further delay will substantially injure Chad Cringle's financial interests and it certainly serves no public interest to allow BNSF to repeatedly engage in prolonged delay to pursue appeals through which it has no intention of raising any substantive issue about the merits of the underlying judgment.

For these reasons, the Appellee, Chad Cringle, asks that the District Court's Amended Order Concerning Motion for Stay of Execution of Judgment Pending Appeal and Denying Approval of *Supersedeas* Bond be affirmed.

DATED the 21st day of July, 2010.

By: 
Terry N. Triewailer

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of July, 2010, a true and exact copy of the foregoing document was sent by U.S. mail, first class, postage pre-paid, addressed to:

Jeff Hedger
Ben Rechfertig
Attorneys at Law
2800 Central Avenue, Suite C
Billings, MT 59102

Marieke Beck
Department of Labor & Industry
Human Rights Commission
P.O. Box 1728
Helena, MT 59624-1728

By: *Karen R. Weaver*
Karen R. Weaver